A

Gan Boon Aun v Public Prosecutor

B FEDERAL COURT (PUTRAJAYA) — CRIMINAL APPEAL 05–217–10 OF 2015 (W)
ZULKEFLI CJ (MALAYA), ZAINUN ALI, AZAHAR MOHAMED, ZAHARAH IBRAHIM AND AZIAH ALI FCJJ
24 JUNE 2016

C

Criminal Procedure — Jurisdiction of court — Reference of constitutional issue by subordinate court to High Court — Whether High Court judge erred in deciding on constitutional issue — Whether High Court had power to determine constitutional issue — Whether High Court judge should state constitutional issue in form of special case and transmit same to Federal Court in accordance with Rules of the Federal Court — Whether High Court judge erred in making order of acquittal and discharge against appellant — Court of Appeal — Whether Court of Appeal had jurisdiction to hear appeal against decision of High Court on constitutional issue

D

E

Statutory Interpretation — Construction of statute — Literal approach — Whether words of statutory provision were clear and unambiguous — Whether court should give effect to its plain meaning — Whether it was intention of Legislature that jurisdiction and power vested with Federal Court when there was reference of constitutional issue by subordinate court to High Court

F

The appellant, the director of Transmile Group Bhd ('TGB'), and another had been charged with the principal charge of abetting TBG by making a statement that was misleading in a material particular in TBG's quarterly report for the financial year ended 31 December 2006, an offence under s 86(1)(b) read together with s 122(c) of the Securities Industry Act 1983 ('the SIA'). The appellant was alternatively charged with intent to deceive by furnishing a misleading statement to Bursa Malaysia Securities Bhd. At the trial, the sessions court judge found that the prosecution had proved a prima facie case against the appellant and the co-accused and ordered them to enter their defence to the alternative charge. The appellant and co-accused applied for a referral of a constitutional issue, ie whether s 122(1) of the SIA was unconstitutional, to the High Court. The basis of the application, made pursuant to s 30 of the Courts of Judicature Act 1964 ('the CJA'), was that s 122(1) of the SIA was in violation of art 5(1) and art 8(1) of the Federal Constitution ('the Constitution'), which preserved the fundamental right of an accused person to be presumed innocent until proven guilty. The sessions court referred the issue as to the constitutionality of s 122 of the SIA to the High Court. The High Court

G

H

I

declared s 122 (1) of the SIA to be unconstitutional and void and ordered the appellant and co-accused to be acquitted and discharged. The prosecution appealed to the Court of Appeal, which allowed the prosecution's appeal and ordered the decision of the High Court to be set aside. This was the appellant's appeal against the decision of the Court of Appeal. The appellant argued that in a reference under ss 30 and 84 of the CJA, the Court of Appeal had no jurisdiction or power to determine any appeal from the High Court. The prosecution submitted that the High Court judge had no power to determine a question as to the effect of a provision of the Constitution under s 30 of the CJA.

Held, striking out the appeal:

(1) The Court of Appeal did not have the jurisdiction to hear the respondent's appeal against the decision of the High Court on the issue as to whether s 122(1) of the SIA was unconstitutional. Under s 50(1) of the CJA, the Court of Appeal had the jurisdiction to hear and determine criminal appeals from the High Court in one of two instances. In the present appeal the High Court had not tried the alleged offence committed by the appellant in the exercise of its original jurisdiction as the appellant was charged at the sessions court. The High Court also did not exercise its appellate or reversionary jurisdiction in respect of any criminal matter decided by the sessions court as the sessions court merely referred the question to the High Court under s 30 of the CJA. Therefore, neither of the two instances provided under s 50 of the CJA would apply (see paras 16–19).

(2) Under s 30 of the CJA, the High Court judge had to consider and decide whether there was a question of constitutional issue on a matter referred to it by the sessions court that was necessary for the determination of the proceedings before the sessions court. If the matter referred to the High Court did not relate to a constitutional issue to be determined by the Federal Court, it should be sent back to the transmitting court, which in this case was the sessions court for speedy disposal. On the other hand, if the High Court found that a decision on a question as to the effect of a provision of the Constitution was necessary for the determination of the proceedings in the sessions court, it was the duty of the High Court judge under s 84 of the CJA to state the question which had arisen in the form of a special case and transmit that special case to the Federal Court in accordance with the Rules of the Federal Court. Further both ss 30(3) and 84(4) of the CJA made reference to the Rules of the Federal Court, which contained specific provisions to deal with references under ss 30 and 84 of the CJA. It was thus plainly obvious that the Legislature had intended to empower only the Federal Court to determine a question as to the effect of any provision of the constitution in a reference under s 30 of the CJA. The High Court did not have such power (see paras 21–24).

(3) It is trite that where the words of the statutory provision were clear and unambiguous, a court should give effect to its plain meaning. In the present case, the literal approach of interpretation should be adopted for the provisions of ss 30 and 84 of the CJA. It was clear from reading the provisions of ss 30 and 84 of the CJA together with relevant provisions of the Rules of the Federal Court 1995 that it was the intention of the Legislature that the jurisdiction and power was vested with the Federal Court to decide on the constitutionality of any matter that had arisen in the subordinate court and transmitted to the High Court. The High Court judge did not have the power or duty to determine a question as to the effect of a provision of the Constitution (see paras 27–28 & 32).

(4) Further, under art 128(2) of the Constitution, only the Federal Court had the jurisdiction to determine a question as to the effect of any provision of the Constitution for which the record of proceedings had been transmitted to the High Court by a subordinate court (see paras 29–30).

(5) The High Court judge was not deciding the case by way of a criminal appeal or a criminal reference as provided for under the CPC. As such, she was wrong to have made the order of acquittal and discharge against the appellant after deciding on the constitutional issue. In the circumstances, the present case ought to be remitted to the High Court for the High Court judge to decide whether a question of constitutional issue had arisen, to state the question which had arisen in the form of a special case and transmit the same to the Federal Court for determination (see paras 34–35).

[Bahasa Malaysia summary

Perayu, pengarah Transmile Group Bhd ('TGB'), dan seorang lagi telah didakwa dengan pertuduhan utama bersubahat dengan TBG dengan membuat kenyataan yang mengelirukan dalam butiran material dalam laporan suku tahunan TBG bagi tahun kewangan berakhir 31 Disember 2006 , satu kesalahan di bawah s 86(1)(b) yang dibaca bersama dengan s 122(c) Akta Perindustrian Sekuriti 1983 ('APS'). Perayu secara alternatif dipertuduh dengan niat untuk memperdaya dengan memberikan kenyataan mengelirukan kepada Bursa Malaysia Securities Bhd. Pada perbicaraan, hakim mahkamah sesyen mendapati pihak pendakwaan berjaya membuktikan kes prima facie terhadap perayu dan tertuduh bersama dan mengarahkan mereka untuk membela diri terhadap pertuduhan alternatif. Perayu dan tertuduh bersama memohon rujukan isu perlembagaan, iaitu sama ada s 122(1) APS adalah tidak mengikut perlembagaan, ke Mahkamah Tinggi. Asas permohonan tersebut, yang dibuat menurut s 30 Akta Mahkamah Kehakiman 1964 ('AMK'), adalah bahawa s 122(1) APS melanggar perkara 5(1) dan perkara 8(1) Perlembagaan Persekutuan ('Perlembagaan'), yang memelihara hak asasi seseorang tertuduh yang dianggap tidak bersalah sehingga dibuktikan bersalah. Mahkamah sesyen

merujuk isu berhubung keperlembagaan s 122 APS ke Mahkamah Tinggi. Mahkamah Tinggi mengisytiharkan s 122(1) APS tidak mengikut perlembagaan dan terbatal dan mengarahkan perayu dan rakan tertuduh dilepaskan dan dibebaskan. Pihak pendakwaan merayu ke Mahkamah Rayuan yang membenarkan rayuan pihak pendakwaan dan memerintahkan keputusan Mahkamah Tinggi diketepikan. Ini adalah rayuan perayu terhadap keputusan Mahkamah Rayuan. Perayu berhujah bahawa dalam rujukan di bawah ss 30 dan 84 AMK, Mahkamah Rayuan tidak mempunyai bidang kuasa atau kuasa untuk menentukan apa-apa rayuan daripada Mahkamah Tinggi. Pihak pendakwaan berhujah bahawa hakim Mahkamah Tinggi tidak mempunyai kuasa untuk menentukan persoalan tentang kesan peruntukan Perlembagaan di bawah s 30 AMK.

Diputuskan, menolak rayuan:

(1) Mahkamah Rayuan tidak mempunyai bidang kuasa untuk mendengar rayuan responden terhadap keputusan Mahkamah Tinggi berhubung dengan isu sama ada s 122(1) APS tidak mengikut perlembagaan. Di bawah s 50(1) AMK, Mahkamah Rayuan mempunyai bidang kuasa untuk mendengar dan memutuskan rayuan jenayah daripada Mahkamah Tinggi dalam satu daripada dua keadaan. Dalam rayuan ini, Mahkamah Tinggi tidak membicarakan kesalahan yang didakwa dilakukan oleh perayu dalam menjalankan bidang kuasa asalnya memandangkan perayu didakwa di mahkamah sesyen. Mahkamah Tinggi juga tidak menjalankan bidang kuasa rayuan atau penyemakannya berkenaan dengan sebarang perkara jenayah yang diputuskan oleh mahkamah sesyen memandangkan mahkamah sesyen hanya merujuk persoalan ke Mahkamah Tinggi di bawah s 30 AMK. Oleh itu, mana-mana daripada kedua-dua keadaan yang diperuntukkan di bawah s 50 AMK akan terpakai (lihat perenggan 16–19).

(2) Di bawah s 30 AMK, hakim Mahkamah Tinggi perlu mempertimbangkan dan membuat keputusan sama ada terdapat persoalan isu perlembagaan pada perkara yang dirujukkan kepadanya oleh mahkamah sesyen yang penting untuk penentuan prosiding-prosiding di hadapan mahkamah sesyen. Jika perkara yang dirujukkan ke Mahkamah Tinggi tidak berkaitan dengan isu perlembagaan yang akan ditentukan oleh Mahkamah Persekutuan, perkara tersebut perlu dihantar ke mahkamah yang menghantarnya, yang dalam kes ini mahkamah sesyen untuk pelupusan cepat. Sebaliknya, jika Mahkamah Tinggi mendapati bahawa keputusan mengenai sesuatu persoalan tentang kesan daripada peruntukan Perlembagaan adalah perlu untuk penentuan prosiding di mahkamah sesyen, adalah menjadi tanggungjawab hakim Mahkamah Tinggi di bawah s 84 AMK untuk menyatakan persoalan yang timbul dalam bentuk kes khas dan menghantar kes khas tersebut ke Mahkamah Persekutuan menurut

Kaedah-Kaedah Mahkamah Persekutuan. Seterusnya kedua-dua ss 30(3) dan 84(4) AMK membuat rujukan kepada Kaedah-Kaedah Mahkamah Persekutuan yang mengandungi peruntukan khusus untuk berurusan dengan rujukan di bawah ss 30 dan 84 AMK. Oleh itu, adalah jelas bahawa Badan Perundangan bertujuan untuk memberi kuasa hanya kepada Mahkamah Persekutuan untuk menentukan persoalan yang berbangkit tentang kesan mana-mana peruntukan perlembagaan dalam rujukan di bawah s 30 AMK. Mahkamah Tinggi tidak mempunyai kuasa tersebut (lihat perenggan 21–24).

(3) Adalah tidak dipertikaikan di mana perkataan peruntukan berkanun adalah jelas dan tidak samar, mahkamah perlu menguatkuasakan maksudnya yang ringkas. Dalam kes ini, pendekatan harfiah pentafsiran perlu diguna pakai untuk peruntukan ss 30 dan 84 AMK. Adalah jelas daripada bacaan peruntukan ss 30 dan 84 AMK bersama-sama dengan peruntukan yang berkaitan dalam Kaedah-Kaedah Mahkamah Persekutuan 1995 bahawa adalah niat badan perundangan bahawa bidang kuasa dan kuasa terletak pada Mahkamah Persekutuan untuk memutuskan mengenai keperlembagaan apa-apa perkara yang telah timbul di mahkamah bawahan dan dihantar kepada Mahkamah Tinggi. Hakim Mahkamah Tinggi tidak mempunyai kuasa atau kewajipan untuk menentukan persoalan tentang kesan daripada peruntukan Perlembagaan (lihat perenggan 27–28 & 32).

(4) Seterusnya, di bawah perkara 128(2) Perlembagaan, hanya Mahkamah Persekutuan mempunyai bidang kuasa untuk menentukan persoalan tentang kesan mana-mana peruntukan Perlembagaan di mana rekod prosiding telah dihantar kepada Mahkamah Tinggi oleh mahkamah rendah (lihat perenggan 29–30).

(5) Hakim Mahkamah Tinggi tidak memutuskan kes tersebut melalui rayuan jenayah atau rujukan jenayah sebagaimana yang diperuntukkan di bawah KPJ. Oleh itu, beliau terkhilaf dalam mengarahkan perintah pembebasan dan pelepasan terhadap perayu selepas memutuskan mengenai isu perlembagaan. Dalam keadaan tersebut, kes ini sepatutnya dihantar ke Mahkamah Tinggi untuk hakim Mahkamah Tinggi memutuskan sama ada persoalan berhubung isu perlembagaan telah timbul, menyatakan persoalan yang timbul dalam bentuk kes khas dan menghantar persoalan tersebut ke Mahkamah Persekutuan untuk penentuan (lihat perenggan 34–35).]

Notes

For cases on jurisdiction of court in general, see 5(2) *Mallal's Digest* (5th Ed, 2015) paras 2725–2885.

For cases on literal approach, see 11(2) *Mallal's Digest* (5th Ed, 2015) paras 1921–1953.

Cases referred to

Danaharta Urus Sdn Bhd v Kekatong Sdn Bhd (Bar Council Malaysia, Intervener) [2004] 2 MLJ 257, FC (refd)
Dr Koay Cheng Boon v Majlis Perubatan Malaysia [2012] 3 MLJ 173, FC (refd)
Gerald Fernandez v Attorney-General, Malaysia [1970] 1 MLJ 262, FC (refd)
Vengadasalam v Khor Soon Weng & Ors [1985] 2 MLJ 449, SC (refd)

Legislation referred to

Commonwealth Fugitive Criminals (Amendment) Act 1969 [UK]
Courts of Judicature Act 1964 ss 30, 30(1), (2), (3), 48, 50(1), 84, 84(1), (3), (4)
Criminal Procedure Code
Federal Constitution arts 4(4), 5(1), 7(2), 8(1), 128(2)
Rules of the Federal Court 1995 rr 31, 32, 32(1), (2), 33, 33(1), (2), (3), 34, 35, 36, 37, 38, 39, Part XI
Securities Industry Act 1983 (repealed by Capital Markets and Services Act 2007) s 122(1)

Appeal from: Criminal Appeal No W-09–258–11 of 2011 (Court of Appeal, Putrajaya)

Tan Hock Chuan (K Kumaraendran, Cheah Sin Chin, Cains Tan and Lee Wenxu with him) (Tan Hock Chuan & Co) for the appellant.
Manoj Kurup (Shanti Geoffrey, Mohd Hafiz Mohd Yusoff and Munira Masood with him) (Deputy Public Prosecutor, Attorney General's Chambers).

Zulkefli CJ (Malaya) (delivering judgment of the court):

BACKGROUND FACTS

[1] The appellant together with another accused person, Khiudin bin Mohd were charged before the sessions court in Kuala Lumpur and the charges are as follows:

Principal charge:

> That you between 28 February 2006 to 15 February 2007, at Bursa Malaysia Securities Bhd, Exchange Square, Bukit Kewangan, 50200 Kuala Lumpur, in the Federal Territory of Kuala Lumpur, abetted Transmile Group Bhd (Company No 373741 – W) in making a statement that is misleading in a material particular in Transmile Group Bhd's 'Quarterly Report On Unaudited Consolidated Results For The Financial Year Ended 31 December 2006' and the misleading statement is underlined in red in the Appendix to this charge, and the said statement is likely to induce the purchase of securities of Transmile Group Bhd by other persons, and when the statement is misleading in a material particular, and you have thereby committed an offence under s 86(b) read together with s 122C(c) of the Securities Industry Act 1983 ('Act 280') and punishable under s 88B of the same Act.

Alternative charge:

> That Transmile Group Bhd (Company No 373741 – W) between 14 February 2007 and 15 February 2007 at Bursa Malaysia Securities Bhd, Exchange Square, Bukit Kewangan 50200 Kuala Lumpur, in the Federal Territory of Kuala Lumpur, has committed an offence under s 122B(a)(bb) of the Securities Industry Act 1983 ('Act 280') when it, with intent to deceive, furnished a misleading statement to Bursa Malaysia Securities Bhd in Transmile Group Bhd's 'Quarterly Report On Unaudited Consolidated Results For The Financial Year Ended 31 December 2006' and the misleading statement is underlined in red in the Appendix to this Charge and that you, who at the time of the commission of the offence was a director of Transmile Group Bhd, are deemed to have committed an offence under s 122B(a)(bb) read together with s 122(1) of the Securities Industry Act 1983, and punishable under s 122B of the same Act.

[2] On 16 March 2011, the sessions court judge held that the prosecution had proved a prima facie and ordered them to enter on their defence to the alternative charge.

[3] On 21 June 2011, before the commencement of the defence case, an application was made by the appellant and Khiudin bin Mohd for a referral of a constitutional question to the High Court under s 30 of the Courts of Judicature Act 1964 ('the CJA'). The sessions court thereafter transmitted the case to the High Court under the said s 30 of the CJA.

[4] The High Court, on 14 November 2011, declared s 122(1) of the Securities Industry Act 1983 ('the Act') to be unconstitutional on the basis that it is completely inconsistent with the fundamental right of an accused person to be presumed innocent until proven guilty as provided in art 5(1) of the Federal Constitution.

[5] In her written grounds of judgment, the learned High Court judge, inter alia, held as follows:

(a) that s 122(1) of the Act be and is hereby declared unconstitutional and void as being in violation of the right to a fair trial because s 122(1) of the Act completely abrogates the fundamental right of an accused person to be presumed innocent until proven guilty, as a result, s 122(1) of the Act therefore violates arts 5(1) and 8(1) of the Federal Constitution;

(b) that s 122(1) of the Act be and is hereby declared unconstitutional and void as being in violation of the right to a fair trial because s 122(1) of the Act completely abrogates the fundamental right that a criminal charge must be proved by the prosecution against the accused beyond reasonable doubt, as a result, s 122(1) of the Act therefore violates arts 5(1) and 8(1) of the Federal Constitution;

(c) that the arbitrary and indiscriminate use of s 122(1) of the Act in this case is in violation of the fundamental rights of both accused guaranteed under arts 5(1) and 8(1) of the Federal Constitution and must be struck down as unconstitutional;

(d) that s 122(1) of the Act violates the doctrine of separation powers as enshrined in the Federal Constitution and unconstitutional and void;

(e) that the continued prosecution of both accused under the alternative charge after his acquittal on the principal charge is unconstitutional because it is being done in violation of art 7(2) of the Federal Constitution;

(f) that both accused be hereby acquitted and discharged on the alternative charge; and

(g) that the declaration of this court that s 122(1) of the Act is unconstitutional and therefore, void, takes effect prospectively from the date of this judgment in order not to render invalid the prosecutions which have been instituted by the public prosecutor in other cases under s 122(1) of the Act.

[6] The respondent lodged an appeal to the Court of Appeal on 16 November 2011. On 28 September 2015, the Court of Appeal overturned the decision of the High Court and held s 122(1) of the Act to be valid. On the application of the appellant, the Court of Appeal granted a stay of its decision pending an appeal to this court. The appellant had on 7 October 2015 filed an appeal against the decision of the Court of Appeal.

[7] At the outset of the hearing of the appeal before this court, we posed questions to both parties and invited learned counsel for the appellant and the learned deputy public prosecutor ('DPP') for the respondent to address us on the following questions:

(a) whether the High Court, upon a constitutional issue being referred to by the subordinate court, by virtue of s 30(1) of the CJA, was correct in deciding on the constitutional issue and answering the questions referred to it?

(b) whether the present appeal is properly brought before the Federal Court?

(c) whether the High Court was correct in making the order of acquittal and discharge of the accused persons as stated in the grounds of judgment?

SUBMISSIONS OF THE APPELLANT

[8] Learned counsel for the appellant submitted amongst others that under s 84 of the CJA the duty of the High Court judge is confined to staying the proceedings and stating the question which in the opinion of the High Court judge had arisen as to the effect of the provision of the constitution in the form of a special case which shall permit of an answer being given in the affirmative or the negative. Once that is done the High Court judge shall transmit the special case to the Federal Court in accordance with the Rules of the Federal Court.

[9] For the appellant it was further submitted that ss 30(3) and 84(4) of the CJA make reference to the Rules of the Federal Court and Part XI of the Rules of the Federal Court 1995 ('the RFC 1995') entitled 'Special Constitutional Case' contained specific provisions to deal with references under ss 30 and 84 of the CJA. The relevant rules are rr 31, 32, 33 and 34 of the RFC 1995.

[10] It was the appellant's case that the present appeal was not properly brought before this court as the High Court judge had no power to determine a question as to the effect of a provision of the constitution under s 30 of the CJA. The High Court judge should have transmitted the question in the form of a special case to the Federal Court for its determination. In a reference under ss 30 and 84 of the CJA, the Court of Appeal has no jurisdiction or power to determine any appeal from the High Court.

SUBMISSIONS OF THE RESPONDENT

[11] It was the contention of the respondent that the High Court was correct in deciding on a constitutional issue and answering the questions referred to it and the present appeal is therefore properly brought before this court. Learned DPP in support of the respondent's contention submitted that we should look at the legislative history of s 84 of the CJA. Section 84 in its original form existed in s 48 of the CJA which has been repealed where the said provision was couched in mandatory terms. The then s 48 of the CJA provided as follows:

> Where in any proceedings in any High Court a question arises as to the effect of any provision of the Constitution, the Judge hearing such proceeding *shall* stay the same on such terms as may be just to await the decision of such question by the Federal Court. (Emphasis added.)

[12] Learned DPP further submitted, however, in 1964 the CJA was amended leading to the substitution of the word 'may' for the word 'shall' in s 48 of the CJA. Section 84 of the CJA in its present form which reflects the amendment reads as follows:

84(1) Where in any proceedings in the High Court a question arises as to the effect of any provision of the Constitution the Judge hearing the proceedings may stay the same on such terms as may be just to await the decision of the question by the Federal Court.

(2) An order staying proceedings under this section may be made by the Judge of his own motion or on the application of any party and shall be made at such stage of the proceedings as the Judge may see fit having regard to the decision of such questions of fact as may be necessary to be settled to assist the Federal Court in deciding the question which has arisen and to the speedy and economical final determination of the proceedings.

(3) Where an order for stay of proceedings has been made under this section the Judge shall state the question which in his opinion has arisen as to the effect of the Constitution in the form of a special case which so far as may be possible shall state the said question in a form which shall permit of an answer being given in the affirmative or the negative.

(4) Where a Judge shall have stated a special case under this section the same shall be transmitted to the Federal Court in accordance with the Rules of the Federal Court.

[13] Learned DPP also invited this court to consider the reasons for introducing the changes to this provision as set out in the Parliamentary Hansards dated 16 October 1964 introducing the amendments to the CJA in 1964 which are set out below:

> The combined effect of section 30 and section 48 of the Act, as they stand, is to deprive the High Court or any subordinate Court of Jurisdiction to decide any question as to the effect of any provision in the Constitution which arises in any proceedings before it. Any such question existing under the provisions must, therefore, be referred to the Federal Court for decision. *These provisions Mr Speaker, Sir, conflict with the provisions of* Article 128(2) *of the Constitution, which confer jurisdiction, but not however, exclusive jurisdiction on the Federal Court to decide such constitutional questions arising in the proceedings in other Courts.*
>
> *The Bill now seeks to remedy the position by giving a discretion to the High Court or the subordinate Court to refer any such question to the Federal Court.* Section 30 *requires reference to be made by a subordinate Court to the High Court which, in turn, under* section 48, *transmits the question to the Federal Court.* Article 128(2) *of the Constitution provides that the exercise of the jurisdiction of the Federal Court should be subject to any rules of court regulating that jurisdiction, and it is advisable to treat the provisions of* section 30 *in this respect as rules of court. …* (Emphasis added.)

[14] For the respondent it was submitted that it was evident from the *Hansards* above that Parliament had intended to provide the High Court and even the subordinate courts with the jurisdiction to decide any question as to the effect of any provision in the constitution which arises in any proceedings before such courts. It is trite that courts are entitled to consider the *Hansards*

when deciding a case, a principle enunciated by the Federal Court in the case of *Danaharta Urus Sdn Bhd v Kekatong Sdn Bhd (Bar Council Malaysia, Intervener)* [2004] 2 MLJ 257.

[15] Learned DPP highlighted to us the significance of the amendments to the then s 48 of the CJA which was dealt with in the case of *Gerald Fernandez v Attorney-General, Malaysia* [1970] 1 MLJ 262. In *Gerald Fernandez*, the plaintiff had sought for rulings which would have the effect of freeing him from the liability of being surrendered to the Singapore authorities where he was facing charges for corruption. At the High Court, the learned Chief Justice had declined to entertain certain questions on the constitutionality of the Commonwealth Fugitive Criminals (Amendment) Act 1969 on the basis of his reasoning that the High Court had no jurisdiction to hear the matter by virtue of art 4(4) of the Federal Constitution. On appeal in holding otherwise, Suffian FJ in delivering the decision of the Federal Court stated at p 264 as follows:

> With respect, I think the learned chief justice was in error in thinking that he had no jurisdiction. This is not a proceeding for a declaration that the Commonwealth Fugitive Criminals (Amendment) Act, 1969, is invalid on the ground mentioned in cl (3) (namely because Parliament was not competent to enact it), but on the ground that it was inconsistent with art 7(1) which reads:
>
> > No person shall be punished for an act or omission which was not punishable by law when it was done or made, and no person shall suffer greater punishment for an offence than was prescribed by law at the time it was committed.
>
> *It was competent of the High Court to give a ruling on this question. Probably the learned chief justice was misled by being referred to an unamended copy of* s 48(1) of the Courts of Judicature Act *No 7 of 1964 which originally read –*
>
> > Where in any proceedings in any High Court a question arises as to the effect of any provision of the constitution the judge hearing such proceedings *shall* stay the same on such terms as may be just to await the decision of such question by the Federal Court.
>
> *Note well the mandatory word underlined. The appellant's solicitors in their written submission to us repeated the above text, but the word 'shall' has been amended by Act No 35 of 1964 to read 'may'. So it is quite plain that the High Court has jurisdiction. But even without the amendment the High Court would be competent to give a ruling on this question, for the original text of* s 48(1) of the Courts of Judicature Act *was clearly inconsistent with the constitution, the general scheme of which is to empower the High Court (subject to certain restrictions) to pronounce on the constitutionality of Federal and State laws.* (Emphasis added.)

DECISION OF THIS COURT

[16] We shall first deal with the second question posed by us as to whether the present appeal is properly brought before this court from the decision of the Court of Appeal.

[17] It is our considered view that the Court of Appeal did not have the jurisdiction to hear the respondent's appeal against the decision of the High Court given on 14 November 2011 in view of the provision of ss 30 and 84 of the CJA. In the present case the sessions court referred to the High Court under s 30 of the CJA on the constitutionality of 122(1) of the Act. The High Court declared s 122(1) of the Act unconstitutional and void. The Court of Appeal allowed the prosecution's appeal and ordered the said decision of the High Court be set aside.

[18] It is to be noted that under s 50(1) of the CJA the Court of Appeal in respect of criminal appeals shall have jurisdiction to hear and determine any appeal against any decision made by the High Court:

(a) in the exercise of its original jurisdiction; and

(b) in the exercise of its appellate or revisionary jurisdiction in respect of any criminal matter decided by the sessions court.

[19] In the present appeal the High Court did not try the alleged offence committed by the appellant in the exercise of its original jurisdiction as the appellant was charged at the sessions court. The High Court also did not exercise its appellate or revisionary jurisdiction in respect of any criminal matter decided by the sessions court as the sessions court merely referred the question to the High Court under s 30 of the CJA.

[20] We shall now deal with the first question posed by us as to whether the High Court upon a constitutional issue being referred to it by the sessions court under s 30 of the CJA was correct in deciding on the constitutional issue and answering the questions referred to it. We are of the view the provisions of ss 30 and 84 of the CJA on this issue are clear. Those sections provide as follows:

> 30 Reference of constitutional question by subordinate court
>
> (1) Where in any proceedings in any subordinate court any question arises as to the effect of any provision of the Constitution the presiding officer of the court (may) stay the proceedings and (may) transmit the record thereof to the High Court.
>
> (2) Any record of proceedings transmitted to the High Court under this section shall be examined by a Judge of the Court and where the Judge considers that the decision of a question as to the effect of a provision of the Constitution is necessary for the determination of the proceedings he shall deal with the case in accordance

with section 84 as if it were a case before him in the original jurisdiction of the High Court in which the question had arisen.

(3) Subsections (1) and (2) shall be deemed to be rules of court for the purposes of Article 128(2) of the Constitution.

84 Reference of constitutional question by High Court

(1) Where in any proceedings in the High Court a question arises as to the effect of any provision of the Constitution the Judge hearing the proceedings may stay the same on such terms as may be just to await the decision of the question by the Federal Court.

(2) An order staying proceedings under this section may be made by the Judge of his own motion or on the application of any party and shall be made at such stage of the proceedings as the Judge may see fit having regard to the decision of such questions of fact as may be necessary to be settled to assist the Federal Court in deciding the question which has arisen and to the speedy and economical final determination of the proceedings.

(3) Where an order for stay of proceedings has been made under this section the Judge shall state the question which in his opinion has arisen as to the effect of the Constitution in the form of a special case which so far as may be possible shall state the said question in a form which shall permit of an answer being given in the affirmative or the negative.

(4) Where a Judge shall have stated a special case under this section the same shall be transmitted to the Federal Court in accordance with the Rules of the Federal Court.

[21] We would take the view that under s 30 of the CJA the High Court judge has to consider and decide whether there is a question of constitutional issue on matters referred to it by the sessions court necessary for the determination of the proceedings before the sessions court. If there is none the High Court judge must send the case back for continued hearing before the sessions court. On the other hand if the High Court finds that a decision on a question as to the effect of a provision of the constitution is necessary for the determination of the proceedings in the sessions court it is the duty of the High Court judge under s 84 to state the question which in the opinion of the High Court judge had arisen as to the effect of the provision of the constitution in the form of a special case which shall permit of an answer being given in the affirmative or the negative. Once that is done, the High Court judge shall transmit the special case to the Federal Court in accordance with the Rules of the Federal Court.

[22] It is to be stated here that nowhere in ss 30 and 84 of the CJA is power given to the High Court judge to determine a question which concerns the effect of a provision of the constitution which had arisen in the subordinate court and in respect of which the record of proceedings have been transmitted to the High Court by the subordinate court under s 30 of the CJA. That power belongs to the Federal Court.

[23] As regards the application of the provisions of ss 30 and 84 of the CJA it is important to note that both ss 30(3) and 84(4) of the CJA make reference to the Rules of the Federal Court which is in Part XI of the RFC 1995 entitled 'Special Constitutional Case' which contain specific provisions as in rr 31 to 39 to deal with a reference under ss 30 and 84 of the CJA. Rule 31 of the RFC 1995 reads as follows:

> 30 Reference by subordinate court
>
> (1) Where in any proceedings in any court subordinate to a High Court a question rises as to the effect of any provision of the Constitution the presiding officer of such Court shall forthwith stay the proceedings and shall send the record thereof the Registrar of the High Court.
>
> (2) On the receipt of any record of proceedings under this rule the Registrar of the High Court shall lay the same before a Judge of the High Court.
>
> (3) On consideration of any record of proceedings as is herein mentioned where a Judge considers that the decision of a question as to the effect of any provision of the Constitution is necessary for the determination of such proceedings the Judge shall deal with the case as if it were a case before him in the original jurisdiction of the High Court in which such a question has arisen.

It can be readily seen that r 31 of the RFC 1995 is substantially similarly worded as in s 30(1) and (2) of the CJA.

Rules 32 and 33 of the RFC 1995 are reproduced in full as follows:

> 32 Reference by High Court
>
> (1) Where in any proceedings in any High Court a question arises as to the effect of any provision of the Constitution the Judge hearing such proceedings may make an order on such terms as may be just staying such proceedings to await the decision of such question by the Federal Court.
>
> (2) An order staying proceedings under this rule may be made by the Judge of his own motion or on the application of any party and shall be made at such stage of the proceedings as the Judge may consider most suitable having regard to the decision of such questions of fact as may be necessary to be settled to assist the Federal Court in deciding the question which has arisen and to the speedy and economical final disposal of the proceedings.
>
> 33 Special case
>
> (1) Where an order for stay of proceedings has been made under rule 32 the Judge shall state the question which in his opinion has arisen as to the effect of the Constitution in the form of a special case for the opinion of the Federal Court.
>
> (2) The question which has arisen shall be stated in a form which shall permit of an answer being given in the affirmative or the negative.
>
> (3) Every special case stated under the Rule shall be divided into paragraphs and shall concisely state such facts and shall include such documents as may be necessary to enable the Court to decide the question raised thereby and shall be signed by the Judge.

Again it is to be noted that rr 32(1) and (2) read with rr 33(1) and (2) of the RFC 1995 are substantially similarly worded as in the provision of s 84 of the CJA.

[24] It is our considered view that it is plainly obvious that the Legislature has intended to empower only the Federal Court to determine a question as to the effect of any provision of the constitution in a reference under s 30 of the CJA. The High Court does not have such power.

[25] It is also noted that r 33(3) of the RFC 1995 provides that every special case stated under the rule *shall* be divided into paragraphs and *shall* concisely state such facts and *shall* include such documents as may be necessary to enable the court to decide the question raised thereby and *shall* be signed by the judge. The use of the word 'shall' suggests that this requirement is mandatory.

[26] It is further noted that rr 34, 35, 36, 37 and 38 under Part XI of the RFC 1995 entitled 'Special Constitutional Case' contained specific provisions on the mode of dealing with the said special cases.

[27] We would state here that it is trite that where the words of the statutory provision are clear and unambiguous, a court should give effect to its plain meaning. A court should not read words into an act of Parliament unless clear reason for it is to be found within the four corners of the Act itself (see the Supreme Court case of *Vengadasalam v Khor Soon Weng & Ors* [1985] 2 MLJ 449). We are of the view that the literal approach of interpretation should be adopted for the provisions of ss 30 and 84 of the CJA where it is clear that the power or duty of the High Court judge is confined to considering whether the decision as to the effect of a provision of the constitution is necessary for the determination of the proceedings in the subordinate court and to state the question which in his/her opinion has arisen as to the effect of the provision of the constitution in the form of a special case which so far as may be possible shall state the question in a form which shall permit of an answer being given in the affirmative or the negative and transmitting the same to the Federal Court for determination.

[28] It is our considered view that the High Court, being a creature of statute, has no power to enlarge its jurisdiction under ss 30(2) and 84(1) of the CJA. On this point we would refer to the case of *Dr Koay Cheng Boon v Majlis Perubatan Malaysia* [2012] 3 MLJ 173 where the Federal Court had this to say:

> [52] Being a creature of statute, the Court of Appeal has no power to enlarge its jurisdiction. Since the decision of the High Court under s 31(2) of the Act is final, the Court of Appeal has no power to enlarge its jurisdiction by hearing such an appeal. Such an appeal before that court would be incompetent. For the aforesaid reasons I would hold that the decision of the Court of Appeal in the instant appeal,

that it did not have the jurisdiction to hear the appeal by the appellant is correct. The Court of Appeal properly appreciated the applicable law to arrive at a judicious decision.

[29] In dealing with the application of the provisions of ss 30 and 84 of the CJA, it is worth noting the provision of art 128(2) of the Federal Constitution which confers jurisdiction on the Federal Court to determine a question as to the effect of any provision of the constitution. Article 128(2) of the Federal Constitution clearly provides that without prejudice to any appellate jurisdiction of the Federal Court, where in any proceedings before another court a question arises as to the effect of any provision of the constitution, the Federal Court shall have jurisdiction (subject to any rules of court regulating the exercise of that jurisdiction) to determine the question and remit the case to the other court to be disposed of in accordance with the determination.

[30] Based on the clear provision of art 128(2) of the Federal Constitution, we are of the view only the Federal Court has the jurisdiction to determine a question as to the effect of any provision of the Constitution for which the record of proceedings has been transmitted to the High Court by a subordinate court. It is noted that under art 128(2) of the Federal Constitution itself it is mentioned that the Federal Court shall have jurisdiction 'subject to any rules of court regulating the exercise of that jurisdiction'. The rules of court in this context are the relevant rules as provided for under the RFC 1995 as earlier referred to in our judgment. The High Court judge does not have the power or duty to determine a question as to the effect of a provision of the constitution when the record of proceedings of the sessions court is transmitted to the High Court under s 30 of the CJA.

[31] Learned DPP in his submission impressed upon us to consider the legislative history of s 84 of the CJA in its original form in s 48 of the CJA before this s 48 was repealed. Learned DPP also referred to us the Parliamentary Hansards dated 16 October 1964 to consider the reasons for introducing the changes to the provision in s 84 of the CJA. The case of *Gerald Fernandez v Attorney-General, Malaysia* was cited to show that with the amendment the High Court has the jurisdiction and power to pronounce on the constitutionality of federal and state laws.

[32] With respect we are not persuaded by the argument put forward by the learned DPP that the High Court is competent to decide and rule on the constitutionality of any matter transmitted to it by a subordinate court. It is clear now reading the provisions of ss 30 and 84 of the CJA together with the relevant provisions of the RFC 1995 that it is the intention of the Legislature that the jurisdiction and power is vested with the Federal Court to decide on the constitutionality of any matter that had arisen in the subordinate court and

transmitted to the High Court. The High Court does not have the jurisdiction and power to decide on such constitutional issue. It only has the power to decide on such issue if the issue arises for the first time before itself.

[33] We would like to state here and advise all sessions court judges and magistrates when dealing with any application made by any party under s 30 of the CJA to properly ensure that there is merit in such application. It may be just a frivolous application to delay the conduct of the hearing of the trial. If there is no merit in such application the case should proceed to a final conclusion of the trial. A trial should be conducted on a continuous basis without interruption and delay. A trial should not be by instalment. Likewise, High Court judges when presiding to deal with matters brought before them under s 30 of the CJA should act and decide promptly and judiciously whether there is merit in such application. If the matter referred to it does not relate to constitutional issue to be determined by the Federal Court, it should be sent back to the transmitting court for speedy disposal of the case.

[34] We shall finally deal with the third question posed as to whether the High Court was correct in making the order of acquittal and discharge against the appellant after deciding on the constitutional issue and answering the questions referred to it under s 30 of the CJA. Our straight answer to this question is that the High Court judge was clearly wrong in law to have acted in the way she did as she was not empowered to do so. As a judge she was not deciding the case before her by way of a criminal appeal or a criminal reference as provided for under the Criminal Procedure Code.

CONCLUSION

[35] For the reasons abovestated it is our decision that the appeal before this court is incompetent. We therefore strike out the appeal. We make an order that the decisions of the High Court dated 14 November 2011 and of the Court of Appeal dated 28 September 2015 be both set aside. The matter is to be remitted back to the High Court with the order that the High Court judge shall consider, if any, and state the question, which in his/her opinion has arisen as to the effect of the provision of the constitution in the form of a special case which so far as may be possible shall state the question in a form which shall permit of an answer being given in the affirmative or the negative and transmit the same to the Federal Court for determination pursuant to ss 84(3) and (4) of the CJA.

Appeal struck out.

Reported by Kohila Nesan